

**Entered on Docket
February 04, 2011**
GLORIA L. FRANKLIN, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA



1 NOT INTENDED FOR
2 PUBLICATION

**The following constitutes
the order of the court. Signed February 04, 2011**

Charles Noack

**Charles Novack
U.S. Bankruptcy Judge**

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re:

JAVIER R. GUZMAN AND TOSHA F. DJIRBANDEE-RAMOS,

Debtor(s).

Case No. 05-51833 CN
Chapter 13

JAVIER R. GUZMAN AND TOSHA F. DJIRBANDEE-RAMOS

Plaintiffs.

VS.
**RICK PINCH, FRANK O'CONNELL,
EIGHT RODRIGUEZ AND DUFFY &
GUENTHER, LLC.**

Defendants.

Adversary Proceeding No. 08-5133

**MEMORANDUM DECISION
FOLLOWING TRIAL**

On October 27, 2010, this court conducted the trial of the above adversary proceeding, in which plaintiffs asserted equitable lien and fraudulent conveyance claims for relief against defendants. All appearances were noted on the record. Defendants Frank O'Connell, Leigh Rodriguez, and Duffy & Guenther, LLC appeared either pro per or through counsel. This court previously entered the default of defendant Rick Pinch, and Pinch did not appear at trial. Upon consideration of all the evidence and arguments of counsel, the following constitutes this court's findings of fact and conclusions of law under F.R.B.P. 7052(a).

1 This adversary proceeding arises from a judgment entered against defendant Rick Pinch and
2 in favor of plaintiffs Javier Guzman and Tosha Djirbandee-Ramos in Monterey County Superior
3 Court, and the steps that Pinch purportedly took to avoid payment of that judgment. Many of the
4 following facts were admitted by the parties in their Joint Pre-Trial Order, entered on October 19,
5 2010. In addition, the court admitted into evidence and relied on some of the Monterey County
6 Superior Court discovery requests, responses, and certain court transcripts in preparing its findings
7 of fact. Defendants moved to exclude this evidence on the ground that their admittance into
8 evidence would violate the litigation privilege established by California Civil Code § 47(b).
9 Defendants' motion is denied. The litigation privilege bars tort actions based on communications
10 made in any legislative, judicial or other official proceeding. The claims for relief against
11 defendants are based solely on their receipt of funds that are alleged to have been wrongfully
12 transferred. The court acknowledges the breadth of the litigation privilege. Its purpose is "to afford
13 litigants and witnesses free access to the courts without fear of being harassed subsequently by
14 derivative tort actions, to encourage open channels of communication and zealous advocacy, to
15 promote complete and truthful testimony, to give finality to judgments, and to avoid unending
16 litigation." Rusheen v. Cohen, 37 Cal. 4th 1048, 1063 (2006). The gravamen of Plaintiffs' claims,
17 however, are Pinch's payment of defendants' attorneys fees and retainer. The documents and
18 transcripts introduced into evidence do not constitute the tort at issue. Defendants are not being
19 sued based upon any statement that they made or discovery response that they prepared. Section
20 47(b) does not create an evidentiary privilege for the documents and statements at issue.
21 "Statements that are otherwise privileged nonetheless may be used in some circumstances to prove
22 the speaker's state of mind [citations omitted.] While section 47(2) ... bars certain tort causes of
23 action which are predicated on a judicial statement or publication itself, the section does not create
24 an evidentiary privilege for such statements." Kashian v. Harriman, 98 Cal. App. 4th 892, 931-32
25 (2002).

26

27 On March 15, 2006, the Superior Court of California, County of Monterey filed its tentative
28 decision after a eight day trial in litigation commenced by plaintiffs Javier Guzman and Tosha

1 Djirbandee-Ramos (collectively, the “Plaintiffs”) against Rick Pinch. In its decision, the Superior
2 Court found that Pinch defrauded Plaintiffs when he sold them a Carmel Valley mobile home park in
3 2003. The Superior Court determined that Plaintiffs had not provided sufficient evidence for it to
4 award compensatory and punitive damages, and it ordered the parties to appear at a March 30, 2006
5 case management conference to set the matter for an evidentiary hearing on damages. Defendants
6 Frank O’Connell (“O’Connell”) and Leigh Rodriguez (“Rodriguez”) were the attorneys who
7 represented Pinch during the liability phase of the Superior Court action. Pinch terminated
8 Rodriguez and O’Connell’s representation of him in the Superior Court action on or about May 12,
9 2006. Pinch then retained defendant Duffy & Guenther, LLC to represent him in the Superior Court
10 action, which representation began on or about June 2, 2006. The damages phase of the Superior
11 Court action was held in August 2006, and Pinch vigorously argued that Plaintiffs had suffered little,
12 if any damages from their purchase of the mobile home park. The Superior Court disagreed, and on
13 April 10, 2007, it entered an amended judgment against Pinch for \$397,438.00 in compensatory
14 damages, \$400,000.00 in punitive damages, \$12,591.38 in costs, and \$327,975.00 in attorneys fees.
15

16 Pinch used some or all of the Carmel Valley property sales proceeds to purchase a mobile
17 home park in Cody, Wyoming. He took title to the Wyoming mobile home park in the name of
18 “Cooper Subdivision LLC,” a Wyoming limited liability company (“Cooper LLC”). Pinch was the
19 manager and sole owner of the Cooper LLC.¹ Cooper LLC owned and operated the Wyoming
20 mobile home park when the Superior Court issued its March 15, 2006 tentative decision.
21

22 On or about April 17, 2006, Cooper LLC listed the Wyoming mobile home park for sale.
23 Cooper LLC was in contract to sell the property on April 27, 2006, and escrow closed on or about
24 June 13, 2006. Pinch owed Rodriguez \$37,750.00 in attorneys fees when he terminated Rodriguez’s
25 services on May 12, 2006. To satisfy this debt, Pinch authorized Rodriguez to submit a demand into
26

27 ¹ The court does not know exactly when Cooper LLC took title to the Wyoming mobile
28 park home. The admitted facts in the Joint Pre-trial Order simply stated that the property was
purchased “[p]rior to the issuance of the March 15, 2006 tentative decision....”

1 the Cooper LLC sale escrow. The escrow company paid his fees in full on or about June 19, 2006.
2 Pinch owed O'Connell \$38,085.00 in attorneys fees when he terminated his services, and he also
3 authorized O'Connell to submit a demand into the Cooper LLC sale escrow, which was paid in full
4 when escrow closed. The evidence also indicated that Pinch paid another Monterey County
5 Superior Court litigation expense from this sale escrow: a \$3,989.74 court reporter invoice.
6 O'Connell and Rodriguez testified that their invoices were for reasonable services rendered in the
7 Superior Court litigation, and both knew that their fees were being paid by the Cooper LLC sales
8 escrow. The parties stipulated in the Joint Pre-Trial Order that the \$359,626.87 sales balance was
9 wired into Pinch's personal account at First National Bank of Crestview in Florida ("First
10 National"). The evidence also indicated that Pinch moved to Florida at some time in 2006.

11

12 Duffy & Guenther filed its substitution of counsel in the Superior Court action on or about
13 June 20, 2006. Its representation was contingent upon its receipt of a substantial retainer, and on
14 June 20, 2006, First National wired \$130,000.00 into the firm's attorney-trust account, and wired an
15 additional \$15,000.00 into the trust account on June 21, 2006. Plaintiffs did not submit any evidence
16 indicating that the Cooper LLC sales proceeds were the only funds in the First National account
17 when the bank issued the two wire transfers, and Ralph Guenther (a name partner of the firm)
18 testified that his firm did not know where Pinch obtained the money to fund the firm's retainer.

19

20 After the Superior Court issued its March 15, 2006 tentative decision, Plaintiffs aggressively
21 conducted discovery to prepare for the damages phase of the case, and also to determine if Pinch
22 was transferring assets in anticipation of a damages award against him. As stated above, the
23 Wyoming mobile home park was sold during this phase of the Superior Court litigation. On March
24 30, 2006, the Plaintiffs served Pinch with a set of special interrogatories and a demand for
25 production, which, *inter alia*, required Pinch to identify all real property that he (and possibly
26 Cooper LLC) owned and sold in the past five years, and to identify any commercial real property
27 that he presently owned. Pinch verified his interrogatory responses on April 14, 2006, and
28 Rodriguez served the responses on April 24, 2006. Pinch disclosed "his" ownership of the Cooper

1 LLC mobile home park in these responses, but he did not disclose Cooper LLC's recent decision to
2 market the Wyoming mobile home park.² Pinch did not disclose the sale of the Wyoming mobile
3 home park until after the sale closed. On June 21, 2006, Pinch executed a verification for
4 supplemental interrogatory responses prepared by his new counsel, Duffy & Guenther, which
5 responses apparently were served on Plaintiffs that same day. Pinch disclosed in these
6 supplemental responses that Cooper LLC had sold the Wyoming mobile home park. He did not,
7 however, disclose the sales price or how Cooper LLC used the sales proceeds.

8

9 In the midst of this discovery, Plaintiffs sought to prevent Pinch from disposing of his assets.
10 On April 28, 2006, the Superior Court conducted a preliminary injunction hearing arising from a
11 temporary restraining order which restrained Pinch from disposing of certain assets.³ The Superior
12 Court did not extend the temporary restraining order, and instead, on or about May 8, 2006, issued
13 an Order To Show Cause (upon Plaintiffs' application) why it should not enjoin Pinch from
14 transferring any real property, including the Wyoming mobile home park. The Superior Court
15 conducted a hearing on its Order To Show Cause on May 12, 2006, and it did not issue an order
16 enjoining Pinch from disposing of the Wyoming real property. The Superior Court agreed with
17 Pinch's argument that California Code of Civil Procedure § 526 authorized it to enjoin the transfer
18 of real property only if that property was the subject of the litigation before it. Since the Wyoming
19 mobile home park was not the subject of the Monterey County Superior Court litigation, it denied
20 Plaintiffs' application to enjoin the transfer of this real property or any other real property that Pinch
21 owned. O'Connell represented Pinch during the May 12, 2006 hearing, and he knew by that time
22 that the Wyoming mobile home park was for sale.⁴ In addition, the May 12th court transcript clearly

24 ² Plaintiffs' set of special interrogatories did not request that Pinch identify property
25 that he or Cooper LLC were presently marketing for sale.

26 ³ The parties did not submit into evidence the temporary restraining order that was at
issue during the April 28, 2006 hearing.

27 ⁴ Rodriguez was also aware of the sale by this date. While O'Connell represented
28 Pinch during the hearing, he apparently did not prepare Pinch's discovery responses. Rodriguez
signed the discovery responses on Pinch's behalf.

1 indicates that O'Connell informed the Superior Court that Pinch was not insolvent and "had a
2 tremendous amount of assets." Regardless, the brunt of his argument was procedural; that California
3 Code of Civil Procedure §526 did not authorize the Superior Court to enjoin Pinch from transferring
4 the Wyoming real property. Indeed, O'Connell hinted during the May 12, 2006 argument that
5 Plaintiffs should proceed by a pre-judgment writ of attachment if they wished to enjoin Pinch from
6 transferring assets.⁵

7

8 **I. THE PAYMENTS TO RODRIGUEZ AND O'CONNELL DID NOT CONSTITUTE
9 FRAUDULENT TRANSFERS**

10 The Plaintiffs assert that the payments from the Cooper LLC sale escrow to defendants
11 Rodriguez and O'Connell constituted fraudulent conveyances under California's Uniform
12 Fraudulent Transfer Act. This act authorizes a party who has a claim to avoid any "fraudulent"
13 transfer by a person liable on the claim. Cal. Civ. Code § 3439 *et seq.* Civil Code § 3439.04
14 describes two types of transfers which may form a fraudulent transfer: transfers made with the actual
15 intent to hinder, delay or defraud a creditor of the debtor, and transfers made where the debtor does
16 not receive reasonably equivalent value in exchange. Since the court finds that the defendants' legal
17 services constituted reasonably equivalent value, the court will only address the fraudulent transfer
18 allegations under Civil Code § 3439.04(a)(1). The Plaintiffs must prove their case by a
19 preponderance of the evidence. See Whitehouse v. Six Corp., 40 Cal. App. 4th 527 (1995).⁶

20 Civil Code § 3439.04(a)(1) provides that a transfer of property by a debtor is fraudulent if the
21 transfer is made with the actual intent to hinder, delay or defraud any creditor of the debtor. Section
22 3439.04(b) sets forth eleven "badges of fraud" that the court may consider in making its findings of
23 fact under 3439.04(a)(1). The presence of one or more of these "badges" does not create a
24 presumption of fraud, but "merely [constitutes] evidence from which an inference of fraudulent

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27 ⁵ The evidence suggests that Plaintiffs did not have the funds for the bond required for
a pre-judgment writ of attachment.

28 ⁶ It is self-evident that the Plaintiffs had and have a claim against Pinch.

1 intent may be drawn.” Wyzard v. Goller, 23 Cal. App. 4th 1183, 1190 (1994). Plaintiffs presented
2 evidence that raised several badges of fraud. For example, Pinch paid Rodriguez and O’Connell
3 after the Superior Court issued its March 15, 2006 tentative decision, and the facts indicate that
4 Pinch may have moved (i.e. “absconded”) to Florida in 2006, a state with generous exemption
5 rights. In addition, Plaintiffs presented some evidence (the Monterey County Superior Court’s
6 December 11, 2006 amended tentative decision) that Pinch’s net worth eventually was far less than
7 the August 2007 Monterey County judgement. Moreover, given the timing of Pinch’s discovery
8 responses and some of O’Connell’s statements to the Superior Court during the May 12, 2006
9 preliminary injunction hearing, there is also evidence that Pinch perhaps did not timely disclose the
10 sale of the Wyoming mobile home park.⁷ The difficulty with Plaintiffs’ claim, however, is that
11 Pinch paid legitimate attorneys fees that were due and owing, and he was not obligated to disclose
12 the actual transfers at issue: the payment of Rodriguez and O’Connell’s attorneys fees. The
13 Plaintiffs did not present any evidence that these bills were long overdue or that Pinch contested
14 them in any manner. The evidence also indicates that Pinch used the sale escrow to pay other
15 litigation expenses, including the court reporter’s bill. California law allows a debtor to prefer one
16 creditor over another, see Cal. Civ. Code § 3432, and these payments were for attorneys fees that
17 were owed to counsel when Pinch was still vigorously litigating Plaintiffs’ entitlement to any
18 damages. This court can just as easily infer that Pinch paid his attorneys to ensure their cooperation
19 with the transition to his new counsel, Duffy & Guenther.⁸ Moreover, no direct evidence was

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21 ⁷ One could equally conclude that Pinch was not obligated to disclose the pending sale
22 of the Cooper LLC property when he first responded to the Plaintiffs’ set of special interrogatories.
23 Pinch and the buyers were in contract on April 27, 2006, after he submitted his interrogatory
24 responses, and the sale did not close until June 13, 2006. The interrogatories requested information
25 regarding “sales,” not property that had been placed on the market or property that was in contract
26 for sale. Pinch did supplement his interrogatory responses a few days after the sale closed to
disclose this transfer. While this court does not want to encourage discovery gamesmanship, Pinch
appears to have accurately responded to the interrogatory. The court notes that Plaintiffs filed a
motion for sanctions with regard to the timing of Pinch’s disclosure of the Wyoming mobile home
park sale. Plaintiffs did not present any evidence regarding the outcome of this motion.

27 ⁸ Plaintiff’s counsel sought to question defendants regarding their privileged
28 conversations with Pinch, and argued that the privilege did not apply under California Evidence
Code §956. This code section sets forth the “crime/fraud” exception to the attorney-client

1 presented regarding why and when Pinch moved to Florida. Simply, Plaintiffs' burden of proof
2 requires a preponderance of the evidence, and the court concludes that the evidence allows it to
3 equally infer that Pinch paid these attorneys fees for no other reason than that he owed them.⁹

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5 **II. THE PAYMENTS TO DUFFY & GUENTHER WERE NOT FRAUDULENT
CONVEYANCES**

6 For similar reasons, the two payments to Duffy & Guenther also did not constitute fraudulent
7 conveyances. While these payments (unlike the Rodriguez and O'Connell payments) were made by
8 Pinch, the preponderance of the evidence does not establish that he made these transfers with the
9 intent to hinder, delay or defraud Plaintiffs. The evidence demonstrates that Pinch retained Duffy &
10 Guenther to represent him in the damages phase of the Monterey County Superior Court action, and
11 that the law firm, not surprisingly, required a substantial retainer. The evidence also established that
12 Pinch did not believe that Plaintiffs were entitled to compensatory or punitive damages, and that he
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15 privilege. The court sustained defendants' objections. Section 956 provides that "[t]here is no
16 privilege under this article if the services of the lawyer were sought or committed to enable or aid
17 anyone to commit or plan to commit a crime or a fraud." First, there was no evidence which
18 established the commission or planning of any crime. Second, to invoke the fraud provision of
19 §956, Plaintiffs must establish a prima facie case of actual fraud and a reasonable relationship
20 between the fraud and the attorney-client communication in question. See Cunningham v. Conn.
Mut. Life Insur., 845 F. Supp. 1403, 1412 (S.D. Cal. 1994). During trial, Plaintiffs sought to invoke
21 the crime/fraud exception on the ground that Pinch was "using counsel to help him engage in a
22 fraudulent conveyance, which would be fraud under California Evidence Code 956...." A
23 fraudulent conveyance does not necessarily require the commission of a fraud. A fraudulent
24 conveyance can equally be accomplished with the intent to hinder or delay. Plaintiffs did not
present a prima facie case of fraud at trial. Nor did Plaintiffs identify what specific conversations
were subject to the exception. Rather than address this matter through a motion to compel
discovery, Plaintiffs sought to accomplish this at trial by asking general questions regarding the
content of attorney-client conversations. The crime-fraud exception does not result in a wholesale
waiver of the attorney-client privilege, and the court did not feel that it was appropriate to conduct a
lengthy, *in camera* review of privileged communications during trial. Id. at 1415.

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9 Curiously, the parties did not address the issue of whether the payments at issue were
transfers by Pinch. Cooper LLC owned the Wyoming real property, and the sales proceeds were
presumably its property. While there was some evidence from which to infer that Cooper LLC was
Pinch's alter ego - i.e., Pinch was the sole LLC member and his funds were used to purchase the real
property - Plaintiffs did not argue or present any concrete evidence on this issue. See In re Turner,
335 B.R. 140 (Bankr. N.D. Cal. 2005).

1 retained the law firm to vigorously defend himself in the damages phase of the litigation. If Pinch
2 did not believe that the Plaintiffs were entitled to any damages, why would a payment to these
3 attorneys indicate that he intended to hinder, delay or defraud their yet to be determined damages
4 award?

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6 Notwithstanding the above, Guenther & Duffy also established by a preponderance of the
7 evidence their affirmative defense that they accepted the funds in good faith and for a reasonably
8 equivalent value. See Cal.Civ.Code § 3439.08(a). Under this code section, a transferee lacks good
9 faith if he or she “(1) colludes with the debtor or otherwise actively participates in the debtor’s
10 fraudulent scheme, or (2) has actual knowledge of facts which would suggest to a reasonable person
11 that the transfer was fraudulent. Cybermedia, Inc. v. Symantec Corporation, 19 F. Supp. 2d 1070,
12 1075 (N.D. Cal. 1998). Ralph Guenther testified that he did not know where Pinch obtained the
13 funds used to pay his firm’s retainer, and, again, all of the evidence supports a finding that the firm
14 accepted these funds based on its need for a substantial retainer for what it anticipated would be
15 significant litigation (which it proved to be). These facts demonstrate to the court that Duffy &
16 Guenther accepted the funds in good faith and provided significant value to Pinch.

17

18 **III. PLAINTIFFS ARE NOT ENTITLED TO IMPOSE A CONSTRUCTIVE TRUST**

19 The court also will not impose any kind of constructive trust against defendants Rodriguez,
20 O’Connell and Duffy & Guenther. The essence of the constructive trust theory is to prevent unjust
21 enrichment and to prevent a person from taking advantage of his or her own wrongdoing. See PCO
22 v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP, 150 Cal. App. 4th 384 (2007).
23 As set forth above, the court finds that Rodriguez, O’Connell and Duffy & Guenther did not commit
24 any wrongdoing, and that the payments which they received did not unjustly enrich them. Nor did
25 Plaintiffs offer any evidence as to what res should be subject to the constructive trust. Accordingly,
26 the court is denying any recovery on this claim for relief.

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IV. PLAINTIFFS HAVE NOT ESTABLISHED ANY RIGHT TO RECOVER AGAINST PINCH UNDER ITS CLAIMS FOR RELIEF IN THIS ADVERSARY PROCEEDING

This court struck Pinch’s answer and entered his default by order dated October 21, 2010. Plaintiffs, however, did not establish any right to recover against Pinch on the claims for relief herein. Accordingly, the court will not enter a separate judgment against Pinch. Entry of default does not automatically entitle a plaintiff to the entry of a judgment, regardless of the fact that the general effect of entry of default is to deem the allegations admitted. “Courts have wide discretion in deciding whether or not to enter a default judgment under Fed. R. Civ. P. 55, and the Rule itself authorizes the bankruptcy court to conduct such hearings ‘as it deems necessary and proper.’” In re Beltran, 182 B.R. 820, 823 (BAP 9th Cir. 1995). This trial constituted such a hearing, and for the reasons stated above, the court does not find that Plaintiffs met their burden of proof.

V. CONCLUSION

Based on the foregoing, the court concludes that Defendants are entitled to judgment in their favor on each of Plaintiffs' claims. The parties are directed to confer and submit a proposed judgment consistent with this decision.

* * * END OF ORDER * * *

UNITED STATES BANKRUPTCY COURT
For The Northern District Of California

1
2 Adversary Proceeding No. 08-5133
3

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